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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.
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08/914,743 08/19/97 CERRETA

M 6586R

027752 HM12/0613
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EXAMINER

WHITE, E

ART UNIT	PAPER NUMBER
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1623

18

DATE MAILED:

06/13/01

Please find below and/or attached an Office communication concerning this application or proceeding.

Commissioner of Patents and Trademarks

Office Action Summary	Application No. 08/914,743	Applicant(s) CERRETA et al.
	Examiner Everett White	Art Unit 1623



-- The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

Period for Reply

A SHORTENED STATUTORY PERIOD FOR REPLY IS SET TO EXPIRE three MONTH(S) FROM THE MAILING DATE OF THIS COMMUNICATION.

- Extensions of time may be available under the provisions of 37 CFR 1.136 (a). In no event, however, may a reply be timely filed after SIX (6) MONTHS from the mailing date of this communication.
- If the period for reply specified above is less than thirty (30) days, a reply within the statutory minimum of thirty (30) days will be considered timely.
- If NO period for reply is specified above, the maximum statutory period will apply and will expire SIX (6) MONTHS from the mailing date of this communication.
- Failure to reply within the set or extended period for reply will, by statute, cause the application to become ABANDONED (35 U.S.C. § 133).
- Any reply received by the Office later than three months after the mailing date of this communication, even if timely filed, may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

Status

1) Responsive to communication(s) filed on Apr 2, 2001

2a) This action is FINAL. 2b) This action is non-final.

3) Since this application is in condition for allowance except for formal matters, prosecution as to the merits is closed in accordance with the practice under *Ex parte Quayle*, 1935 C.D. 11; 453 O.G. 213.

Disposition of Claims

4) Claim(s) 1-55 is/are pending in the application.

4a) Of the above, claim(s) 20-40 and 55 is/are withdrawn from consideration.

5) Claim(s) _____ is/are allowed.

6) Claim(s) 1-19 and 41-54 is/are rejected.

7) Claim(s) _____ is/are objected to.

8) Claims _____ are subject to restriction and/or election requirement.

Application Papers

9) The specification is objected to by the Examiner.

10) The drawing(s) filed on _____ is/are objected to by the Examiner.

11) The proposed drawing correction filed on _____ is: a) approved b) disapproved.

12) The oath or declaration is objected to by the Examiner.

Priority under 35 U.S.C. § 119

13) Acknowledgement is made of a claim for foreign priority under 35 U.S.C. § 119(a)-(d).

a) All b) Some* c) None of:

1. Certified copies of the priority documents have been received.
2. Certified copies of the priority documents have been received in Application No. _____.
3. Copies of the certified copies of the priority documents have been received in this National Stage application from the International Bureau (PCT Rule 17.2(a)).

*See the attached detailed Office action for a list of the certified copies not received.

14) Acknowledgement is made of a claim for domestic priority under 35 U.S.C. § 119(e).

Attachment(s)

- | | |
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| 15) <input type="checkbox"/> Notice of References Cited (PTO-892) | 18) <input type="checkbox"/> Interview Summary (PTO-413) Paper No(s). _____ |
| 16) <input type="checkbox"/> Notice of Draftsperson's Patent Drawing Review (PTO-948) | 19) <input type="checkbox"/> Notice of Informal Patent Application (PTO-152) |
| 17) <input type="checkbox"/> Information Disclosure Statement(s) (PTO-1449) Paper No(s). _____ | 20) <input type="checkbox"/> Other: _____ |

1. A request for continued examination under 37 CFR 1.114, including the fee set forth in 37 CFR 1.17(e), was filed in this application after final rejection. Since this application is eligible for continued examination under 37 CFR 1.114, and the fee set forth in 37 CFR 1.17(e) has been timely paid, the finality of the previous Office action has been withdrawn pursuant to 37 CFR 1.114. Applicant's submission filed on April 2, 2001 has been entered.
2. Amendment D filed April 2, 2001 has been received and entered into the record.
3. Claims 1-55 are pending in the case. Claims 20-40 and 55 are withdrawn from consideration. Claims 20-40 and 55 have been withdrawn as being directed to a non-elected invention.
4. All 35 U.S.C. statutes not cited in this Office action can be found cited in full in a previous Office action.

35 U.S.C. 112, First Paragraph Rejection

5. Claims 1-20 and 41-54 are rejected under 35 U.S.C. 112, first paragraph, as containing subject matter which was not described in the specification in such a way as to reasonably convey to one skilled in the relevant art that the inventor(s), at the time the application was filed, had possession of the claimed invention.

Claims 1, 2, 7-11, 41 and 42 were amended to indicate a Consistency in a temperature range of 20-40°C of less than about 30 P.sec⁽ⁿ⁻¹⁾ which is not supported in the instant specification which is improper under the first paragraph of 35 U.S.C. 112. Accordingly, the claims are rejected for setting forth new matter.

35 USC 103 Rejection

6. Claims 1-19 and 41-54 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Elsen et al (US Patent No. 5,422,131) for the reasons already of record on pages 4-6 of the Office Action filed May 26, 1999.

7. Applicant's arguments filed April 2, 2001 have been fully considered but they are not persuasive. Applicants argue against the rejection of the claims on the ground that the Elsen et al patent does not disclose a nondigestible composition having a Consistency in a temperature range of 20-40°C of less than about 600 P.sec⁽ⁿ⁻¹⁾. However, this argument is not persuasive since the Elsen et al patent discloses liquid polyol fatty acid polyesters and crystallized solid polyol fatty acid polyesters that are similar to the liquid polyol fatty acid polyesters and crystallized solid polyol fatty acid polyesters of the instantly claimed invention. The physical characteristics and properties of the components used in the composition of the Elsen et al patent are also closely similar to the characteristics and properties of the components used in the instantly claimed invention. For example, see column 3, lines 38-44 of the Elsen et al patent wherein it is disclosed that the "liquid nondigestible oil component of the composition is one which has a complete melting point below about 37°C" and the passage that indicates that "the polyol polyesters which can be used to form the nondigestible solid particles used as oil loss control agents in the compositions are those which have a complete melting point above 37°C." These passages are closely similar to the text set forth in the instant claims, which disclose "flowable nondigestible oil composition comprising a liquid polyol fatty acid polyester having a complete melt point less than 37°C, and a crystallized solid polyol fatty acid polyester having a complete melt point of at least 37°C." See Claim 6 of the instant application wherein it is indicated that the "flowable nondigestible oil composition comprises 50-99% of the liquid polyol fatty acid polyester, and 1-50% of the solid polyol fatty acid polyester" which is embraced in by the Elsen et al patent (see Claim 2 of the Elsen et al patent). There is no evidence of record as to why the Consistency in the temperature range of 20-40°C of less than about 600 P.sec⁽ⁿ⁻¹⁾ for the composition disclosed in the instant claims would not be met by the composition of the Elsen et al patent.

Applicants argument with regard to the application of mechanical shear applied during the cooling process that forms the crystallized particles of requisite size has been considered but is not persuasive because the Elsen patent suggests a procedure for controlling the polyol polyester particles formed in the fat compositions which is comparable to the procedure used in the instant invention. See column 21, last paragraph of the Elsen patent wherein Elsen et al discussed how

the size of the particles formed is dependent upon the rate at which the heated combination of oil and dissolved solid is cooled. Accordingly, the rejection of Claims 1-19 and 41-54 under 35 U.S.C. 103(a) as being unpatentable over Elsen et al patent is maintained.

8. **Summary:** Claims 1-19 and 41-54 are rejected; Claims 20-40 and 55 are withdrawn from consideration.

ACTION MADE FINAL

9. All claims are drawn to the same invention claimed in the application prior to the entry of the submission under 37 CFR 1.114 and could have been finally rejected on the grounds and art of record in the next Office action if they had been entered in the application prior to entry under 37 CFR 1.114. Accordingly, **THIS ACTION IS MADE FINAL** even though it is a first action after the filing of a request for continued examination and the submission under 37 CFR 1.114. See MPEP § 706.07(b). Applicant is reminded of the extension of time policy as set forth in 37 CFR 1.136(a).

A shortened statutory period for reply to this final action is set to expire THREE MONTHS from the mailing date of this action. In the event a first reply is filed within TWO MONTHS of the mailing date of this final action and the advisory action is not mailed until after the end of the THREE-MONTH shortened statutory period, then the shortened statutory period will expire on the date the advisory action is mailed, and any extension fee pursuant to 37 CFR 1.136(a) will be calculated from the mailing date of the advisory action. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of this final action.

Examiner's Telephone Number, Fax Number, and Other Information

10. For 24 hour access to patent application information 7 days per week, or for filing applications electronically, please visit our website at www.uspto.gov and click on the button "Patent Electronic Business Center" for more information.

Any inquiry concerning this communication or earlier communications from the examiner should be directed to E. White whose telephone number is (703) 308-4621. The examiner can normally be reached on Monday-Friday from 9:30 AM to 6:00 PM.

If attempts to reach the examiner by telephone are unsuccessful, the examiner's supervisor, Gary Geist, can be reached on (703) 308-1701. The fax phone number for this Group is (703) 308-4556.

Any inquiry of a general nature or relating to the status of this application or proceeding should be directed to the Group receptionist whose telephone number is (703) 308-1235.

E. White

White

June 5, 2001



GARY GEIST
SUPERVISORY PATENT EXAMINER
TECH CENTER 1600